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IN THE

Supreme Court of the United States

October Term, 1973

No. 73-38

UNITED STATES OF AMERICA,
Appellant,
v.
MARINE BANCORPORATION, THE NATIONAL BANK OF COMMERCE OF SEATTLE, WASHINGTON TRUST BANK, AND JUSTIN T. WATSON, ACTING COMPTROLLER OF THE CURRENCY
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON

MOTION TO DISMISS OR IN THE ALTERNATIVE TO AFFIRM OR ADVANCE THE CASE FOR EARLY ARGUMENT

Pursuant to Rule 16(1)(a) and (c) of the Rules of this Court, Appellees move that the appeal be dismissed because not taken in conformity with said Rules, or, in the alternative, that the judgment of the District Court be affirmed.

INTRODUCTORY STATEMENT

This is an appeal by the United States from a final judgment of the District Court dismissing after trial the Appellant's complaint under Section 7 of the Clayton Act (15 USC §18), seeking to enjoin the merger of the Appellees,

The National Bank of Commerce of Seattle (NBC) and Washington Trust Bank (WTB) of Spokane, Washington. The challenge to the merger is limited to its effect with respect to potential competition only, it being conceded that there is no significant existing competition involved.

In addition to their denial to the charge as alleged, the Banks have asserted an affirmative defense under the Bank Merger Act (12 USC §1828(c)) that anticompetitive effects of the merger, if any, are clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served.

MOTION TO DISMISS

The Appeal was Not Timely Docketed

The appeal was not docketed within the time limits fixed by the Rules of this Court and should therefore be dismissed.

The judgment was entered January 31, 1973. On February 9, 1973, Appellant filed a Motion for Additional Findings. An Order denying this Motion was entered by the District Court on February 22, 1973. Notice of Appeal was filed March 30, 1973. On May 3, 1973, Appellant sought and obtained from Mr. Justice Douglas an order extending until May 23, 1973 the time for docketing the case on appeal. Appellant based its application for this order on the ground that the 90-day period allowed by Rule 13(1) should properly run from the date upon which its Motion for Additional Findings was denied by the District Court (February 22, 1973), rather than the date upon which the judgment had been entered (January 31, 1973),

and that the extension of time would merely eliminate any doubt in that regard.

On May 16, 1973 (less than ten days prior to May 23, 1973), Appellant again made an *ex parte* application to Mr. Justice Douglas for a further extension of time to June 30, 1973 in which to docket the appeal. This application (App. I, *infra* p. A-1) assigned no reason for the additional 38-day extension requested, other than that it was necessary to complete the Jurisdictional Statement and print it.

Appellees received a copy of this second application on May 17, 1973, and, not being aware that it had already been granted, immediately filed a written objection thereto (App. II, *infra* p. A-3), pointing out the hardships imposed on the banks as a result of the merger having already been delayed since October 22, 1971, and protesting the additional extension of time as unauthorized by the Rules and entirely unwarranted.

In this connection, Rule 34(2) provides as follows:

> "Applications for extension of time to file petitions for certiorari or to docket appeals shall be submitted *at least ten days* before the expiration of the period sought to be extended *and will not be granted except in the most extraordinary circumstance if filed during the last ten days of such period.*" [Emphasis added]

Rule 34(2) is not only positive, but unconditional—it provides that such an application filed during the last ten days of the period "will not be granted except in the most extraordinary circumstance". No discretionary action is authorized in the absence of a showing that extraordinary circumstances have arisen, and no such showing was made.

In addition, Rule 13 provides that even when made prior to the last ten days of the period, such application will be granted only for "good cause shown" and that

"Such applications are not favored". No "cause" at all was shown for the second extension of time.

Appellees submit that the Department of Justice should not be exempt from the Rules which bind other litigants at the bar of this Court. If the Jurisdictional Statement had been filed within the time required by the Rule, this Motion to Affirm could have been filed and possibly acted upon prior to the end of the last term.

We submit that this appeal has not been docketed within the time for docketing as provided by the Rules, and should therefore be dismissed.

MOTION TO AFFIRM

This Motion is based on the ground that the questions raised by Appellant's Jurisdictional Statement are so insubstantial as to need no further argument, and do not require plenary consideration by this Court for their resolution.

In support of this Motion, we draw the Court's attention to the following:

1. Appellees' affirmative defense under the Bank Merger Act (12 USC §1828(c))— that any anticompetitive effects of the merger are clearly outweighed in the public interest by the probable effect of the merger in meeting the convenience and needs of the community to be served—which has been upheld by the District Court, is decisive of the case. The questions raised by Appellant on this issue are so insubstantial as to need no further argument.[1]

1. The propriety of the District Court's determination of this issue, upon which the decision of the case depends, is not even included as a question presented by the appeal in Appellant's required Statement under Rule 15(c). Note the last sentence of the Rule that only the questions set forth in the jurisdictional statement or fairly comprised therein will be considered by the Court.

2. On the Clayton 7 issue, the District Court's Findings of Fact establish the existence of both legal and economic barriers which constitute a positive bar to the entry of Appellee NBC into Spokane by any means other than the challenged merger. (Finding of Fact No. 18, Jur. St. pp. 30-33.) There is substantial evidence in the record in support of these findings, and they are decisive of the Clayton 7 issue. Appellant does not contend that a bank which is barred from entry may nevertheless be a potential entrant, but merely disputes the District Court's findings that NBC is in fact barred from entry by other means. Appellant is asking this Court to review *de novo* the facts, and substitute its judgment for that of the trial court.

3. Rule 52, the "clearly erroneous" rule, applies to appeals by the Government as well as to those by other litigants. There is no exception which permits it, even in an anti-trust case, to come to this Court for what virtually amounts to a trial *de novo* on the record.

APPELLEES' AFFIRMATIVE DEFENSE UNDER THE BANK MERGER ACT IS DECISIVE OF THE CASE

In addition to determining that Appellant had failed to prove that the challenged merger, if consummated, may substantially lessen competition in any line of commerce in any section of the country in violation of Section 7 of the Clayton Act, the District Court also found and concluded that if, contrary to its finding and conclusions with respect to the Clayton 7 issue, the merger did have some or all of the anticompetitive effects alleged by Appellant, the Appellees have sustained the burden of establishing their affirmative defense under the Bank Merger Act; that

said anticompetitive effects are clearly outweighed in the public interest by the probable effects of the merger in meeting the convenience and needs of the community to be served. In this connection, the Court also found as a fact that there is no reasonable alternative means of providing these benefits of the merger. (Findings of Fact Nos. 25 and 26, and Conclusions of Law No. 5, Jur. St., App. A pp. 36-47.)

The applicable provision of the Bank Merger Act (12 USC §1828(c)) provides in pertinent part as follows:

> "(5) The responsible agency [in this case the Comptroller] shall not approve—
>
> (A) • • •
>
> (B) any other proposed merger transaction whose effect in any section of the country may be substantially to lessen competition, or to tend to create a monopoly, or which in any other manner would be in restraint of trade, unless it finds that the anticompetitive effects of the proposed transaction are clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served.
>
> • • •
>
> (7) (B) In any judicial proceeding attacking a merger transaction approved under paragraph (5) on the ground that the merger transaction alone and of itself constituted a violation of any antitrust laws other than section 2 of Title 15, the standards applied by the court shall be identical with those that the banking agencies are directed to apply under paragraph (5).
>
> • • •"

That the Bank Merger Act has created a new affirmative defense which can justify the consummation of bank mer-

gers, notwithstanding the fact that they might otherwise offend the antitrust laws, is no longer open to question. *United States v. Third National Bank in Nashville*, 390 U.S. 171. As the Court stated in that case (390 U.S. at page 178):

> "Last Term, in United States v. First City National Bank of Houston, 386 U.S. 361, 18 L.Ed.2d 151, 87 S.Ct. 1088 (1967) the Court interpreted the procedural provisions of the 1966 Act, holding that the Bank Merger Act provided for continued scrutiny of bank mergers under the Sherman Act and the Clayton Act, but created a new defense, with the merging banks having the burden of proving that defense. The task of the district court was to inquire *de novo* into the validity of a bank merger approved by the relevant bank regulatory agency to determine, first, whether the merger offended the antitrust laws and, second, if it did, whether the banks had established that the merger was nonetheless justified by 'the convenience and needs of the community to be served'."

The District Court has followed this procedure precisely in the instant case. While its initial conclusion that the consummation of the merger would not offend the antitrust laws would, of course, be decisive of the case, the Court was not unmindful of the fact that district judges are not infallible in this area, and followed the sound legal practice of also determining the validity of the banks' affirmative defense to the charges made against them, so that in the event of an appeal, the entire matter could be disposed of by this Court. There can be little doubt that this is not only a sound practice generally, but particularly appropriate in cases where there is an express policy as manifested by the Expediting Act (15 USC §29) to minimize delay in reaching the final determination of antitrust litigation instituted by the government, which ordinarily involves onerous injunctive restraints on the defendants.

Thus, in the absence of a material legal deficiency in the procedure followed, or in the sufficiency of the evidence upon which the Court determined that the balance of public interest justified the consummation of the merger, the Court's determination of the convenience and needs issue is decisive of the case.

Appellant's Jurisdictional Statement makes only two brief comments on this decisive aspect of the appeal (Jur. St. p. 23). First, that the benefits to be furnished are "not sufficiently important to justify the anticompetitive consequences" of the merger, and that, in any event, there were ample alternative sources in Spokane for the "few specialized services" to be made available by NBC. Second, that it is not possible for the District Court to determine the convenience and needs issue in the same proceeding where it has determined that there was no violation of Clayton 7, citing *United States v. Third National Bank in Nashville*, 390 U.S. 171, in support of this contention.

It is submitted that both of these contentions are so insubstantial as not to require further argument, and certainly do not justify plenary consideration by the Court for their resolution.

As to the first contention, a brief review of the District Court's Findings of Fact on this issue (Findings of Fact Nos. 25, 26 and 27, Jur. Stmt. pp. 36-46- together with Findings of Fact Nos. 15 and 16, Jur. Stmt. pp. 28-29) will disclose the complete inaccuracy of Appellant's contention as to the extent and scope of the needs of the community (to say nothing of its convenience) which the merged bank would be in a position to fulfill. The Findings also reflect

that the "alternative" source, to the extent there is one, in a number of areas of large importance to the community (larger loans to local merchants, manufacturers, contractors and governmental agencies, residential mortgage loans, international banking), is the only source—Seattle-First National Bank. Appellant has not challenged these findings in any way except as above noted, nor claimed that they are not fully supported by the evidence.

As to the second contention, it is inconceivable that it is impossible under the Bank Merger Act to dispose of all issues in a single proceeding. Under Appellant's contention wherever a District Court decides that no violation of the antitrust law is involved, it is thereby rendered incapable of assessing the relative importance of the benefits of the proposed transaction to the public as against the anti-competitive effects alleged, taken at face value as alleged.

In cases such as the case at bar, should the Appellate Court differ with the trial court as to the antitrust issue, a second trial and a second appeal would be mandated in order to deal with the affirmative defense expressly granted by the Act—there would be no other way. This would indeed be a pernicious doctrine and a perversion of the Bank Merger Act. Certainly, nothing in *Nashville* would require such a result.

The Needs (and Convenience) To Be Furnished by NBC

A significant need of the Spokane Metropolitan Area is the need for a bank capable of providing commercial bank customers in the area with a complete alternative in all phases of full-service banking to those offered by the present market leaders, Seattle-First National Bank and Old

National Bank (Findings of Fact No. 25(a), sub-paragraphs A, B, C, D and E, Jur. St. pp. 36-37). This is not only the view of the District Court, but also the view of the Comptroller of the Currency. (Pretrial Order Ex. A.) The Court found that Appellee NBC is fully qualified in this respect and that Appellee WTB is not. (Findings of Fact Nos. 15 and 16, Jur. St. pp. 28-29.)

As Appellant's statistical Exhibits (GXA-54, 55, and 58) show, Seattle-First National Bank, the largest banking organization in the State of Washington, holds 31.6% of total deposits, 34.2% of outstanding loans, and operates seven banking offices in the Spokane Metropolitan Area. Old National Bank is the lead bank of a banking organization which holds 42.1% of deposits, 39.8% of outstanding loans, and operates 23 banking offices in the area. Thus, these two largest banking organizations in the Spokane Metropolitan Area hold 73.7% of the total deposits, 74% of the outstanding loans, and operate 30 of the existing 46 banking offices in the area.

In several important phases of commercial banking, Seattle-First National Bank has been characterized by witnesses as "the only store in town". For example, it has a loan limit of $12 million, as compared with $2 million on the part of Old National Bank, and $1.25 million on the part of Appellee WTB. On the other end of the scale, Seattle-First National Bank is the only commercial bank in the area offering residential mortgage loans in volume (Finding of Fact No. 25(e), Jur. St. pp. 40-41).

Appellee NBC has a loan limit of $7.5 million, and is active in the field of residential (FHA, VA, and conventional), as well as commercial, mortgage loans.

The District Court found that Appellee WTB's activities are deficient in a number of areas important to a wide spectrum of the commercial bank customers in Spokane. It found that WTB's activities are very limited in the areas of agricultural loans, residential and commercial mortgage loans,[2] mining loans, and inventory and accounts receivable financing; that its Trust Department and investment advisory services are substantially limited; that it provides no services in the area of international banking; that it does not participate in the municipal bond market; that its credit card service is in danger of being discontinued due to inadequate yield; that it has not been able to provide the full needs of some of its customers and potential customers due to its loan limit, and that this problem is growing worse; that it does not make student loans;[3] and that it does not make term capital loans or "turnkey" loans, due to insufficient resources. Appellee NBC has a strong capability and expertise in all of these areas and will make them available to commercial bank customers in Spokane. (Findings of Fact Nos. 15, 16 and 25, Jur. St. pp. 28-29 and pp. 36-46.)

The Court's Findings of Facts on this issue not only specify in detail the areas of need and the capability of NBC to fill them, but also recite a number of specific examples of the needs and deficiencies of the area, with particular reference to the need for a viable alternative to Seattle-First National Bank as the "only store in town".

2. WTB has never entered the field of residential mortgage loans at all, which is a substantial need in the Spokane area. (Finding of Fact No. 25(e), Jur. St. pp. 40-41.)

3. The only reliable source of student loans in Spokane is Washington Mutual Savings Bank, a non-commercial bank. NBC has a policy of making such loans in areas where it has banking offices (Finding of Fact No. 25(h) B and H, Jur. St. pp. 44-45).

None of these Findings are challenged by Appellant; Appellant merely attempts to denigrate them. The Findings speak for themselves, and certainly form a solid basis for the conclusion which the District Judge has reached.

Nor does Appellant challenge the Court's finding that there is no reasonable alternative means of providing the services involved. Only a full-service bank is capable of providing an effective alternative to Seattle-First National Bank in the varied areas where the need exists. As appellant concedes in its Jurisdictional Statement (p. 8), NBC is barred by Washington law from *de novo* branching into Spokane.[4] Washington law also bars expansion by holding company affiliation.[5] Acquisition of an "existing" bank "operating" in the city of Spokane is the only means of entry permitted. The District Court has found as a fact that there is no other bank, of whatever size, available for acquisition at the present time, and that there is no reasonable probability that any such bank will be available on any reasonably acceptable basis at any time in the reasonably forseeable future. (Findings of Fact No. 19(a), Jur. St. p. 31.) The only other means of entry which is even suggested is that the statutory ban on *de novo* branching may be avoided by "sponsoring" the organization of an "independent" bank which could later be "acquired" by merger. Appellant concedes, however, that such new bank would have to operate on its own for a sufficient period as a "*bona fide* and independent institution" "to establish itself in the local banking structure" before it could be acquired. (Jur. St. p. 9, and footnote 7, pp. 14-15.)

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4. RCW 30.40.020, App. III, p. A-6, *infra*.

5. RCW 30.04.230, App. IV, p. A-8, *infra*.

While we are of the view that this suggestion would constitute a transparent attempt to evade the state's branching laws, and will comment further on this aspect of the proposal at a later point herein, it is clear that this contention by Justice does not even contemplate entry by NBC into Spokane as a full-service bank until some indeterminate time in the future, if at all.

It is submitted that the most that can be said of Appellant's position on the Court's Findings of Fact on this issue is that Appellant does not agree with it and would therefore like to have this Court review the matter *de novo*. This is not a proper function of appellate review.

Nashville Does Not Bar Determination of Affirmative Defense by District Court

The trial and decision by the District Court in *U.S. v. Third National Bank of Nashville*, 390 U.S. 171 took place shortly after the enactment of the 1966 Bank Merger Act, when the Act had not yet received its first interpretation by this Court. Not having the benefit of that interpretation, the District Court (260 Fed. Supp. 869) construed the Act as merely having introduced an additional element or factor into the basic application of the antitrust standards to bank mergers. In other words, it concluded that the new element introduced by the 1966 Act—the convenience and needs of the community to be served—was simply to be added to the various other considerations pertinent to the determination of whether the merger would offend the antitrust laws in the first instance. In the District Court's view, the effect of the 1966 Act was to restore the *Columbia Steel*[6] approach to the application of the antitrust laws to

6. *U.S. v. Columbia Steel Co.*, 334 U.S. 495.

bank mergers. (260 Fed. Supp. at p. 882 and p. 877.) Accordingly, the District Court made what might be described as a composite determination of the application of Section 7 of the Clayton Act to the merger there involved, in which various needs and conveniences[7] were taken into account, and concluded that the merger did not violate the antitrust standards of the 1966 Bank Merger Act. This process, followed by the District Court in reaching its decision, is described by this Court as having been "scrambled and confused" (390 U.S. at p. 178).

The faulty conclusion which the District Court reached is clearly stated in its opinion (260 Fed. Supp. at p. 883):

> "As the Court . . . concludes that the merger does not violate the antitrust standards of the 1966 Amendment, it is unnecessary to inquire whether any anticompetitive effects are outweighed by the convenience and needs of the community."

Having concluded, as it did, that the merger there in question did in fact violate Section 7 of the Clatyon Act, this Court really had no alternative than to remand the case for a proper weighing of the asserted conveniences and needs against the anticompetitive effects of the merger. The District Court had regarded this to be unnecessary at the trial and had not done it. This Court very properly made no attempt to take over the weighing, but returned the case to the District Court so that this could be done.

To suggest that *Nashville* stands for the proposition that it is not possible for the District Court to ever perform the weighing process in a case where it has also concluded that no antitrust violation has actually occurred is a gross dis-

7. Primarily weaknesses in the financial and management areas of the merged bank which the Court felt would be cured by the merger.

tortion of the Court's decision in that case, and would postulate a ruling of a most onerous and profligate character, which we are convinced this Court would never approve.

It is submitted that the District Court's Finding on the issue of convenience and needs is decisive of this case, notwithstanding the Section 7 issue. Consequently, no plenary consideration of the Section 7 issue requested by Appellant is necessary to its disposition.

ALL POINTS MADE BY APPELLANT WITH REFERENCE TO THE CLAYTON 7 ISSUE CONSTITUTE MERE DISPUTATIONS OF FACTS FOUND BY THE DISTRICT COURT

Appellant Disputes the Fact Found by the District Court That NBC Is Not a Potential Entrant Into Spokane

Even a cursory analysis of Appellant's 15(f) statement (Jur. St. pp. 12-24) will disclose that the questions presented are not really legal questions at all, but merely a disputation of facts found by the District Court.

The principal question as posed by Appellant is—

> ". . . the application of Section 7 of the Clayton Act to the acquisition by a large bank of a major bank in a concentrated significant market in which *the acquiring bank is a potential entrant.*" (Jur. St. pp. 12-13) [Emphasis added]

This question is important, says Appellant, because the United States has frequently invoked the doctrine of potential competition in its effort to stem the trend toward concentration in banking.

However, there is no contest in this case as to the legal question so posed. The appellee banks have never chal-

lenged the doctrine of potential competition, as such, nor its application to the banking industry.

The only questions really raised in this connection are questions of fact, the most significant of which is whether or not Appellee NBC is in fact a potential entrant into the Spokane area. This is an essential element of Appellant's case in the Clayton 7 issue, and Appellant had the burden of proving it.

We do not understand Appellant to even contend that the consummation of the merger would eliminate potential competition on the part of NBC if NBC is not capable of entering Spokane by some other means.

The Findings of Fact of the District Court are unequivocal on this issue. In addition to finding that Appellant had failed to establish that in the event the merger was not consummated there was a reasonable probability that NBC would enter the Spokane market in the reasonably foreseeable future *"or that there is any feasible alternate method by which NBC could do so"*, the Court further found that—

> ". . . On the contrary, the evidence advanced by Defendant and Intervenor has affirmatively established, and the court finds as a fact, that the legal and economic barriers to any other method of entry by NBC into the Spokane metropolitan area are such that in the event the merger is not consummated, there is no reasonable probability that NBC will enter said area in the reasonably foreseeable future." (Finding of Fact No. 19, Jur. St. pp. 30-31)

The Legal Barriers to Entry

The Court's findings then proceed to set out in detail the nature of these barriers:

"Under applicable law governing branching by commercial banks in Washington, NBC cannot establish a branch *de novo* in Spokane or Spokane County. The only legal method by which it can establish a branch in Spokane is by acquiring an existing bank (or a branch of any such bank) operating in Spokane." (Finding of Fact No. 19(a), Jur. St. p. 31)

The Court also found, not only that Appellant had failed to prove that there is any existing bank or branch in the Spokane area, other than WTB, which is available for acquisition, or that there is any reasonable probability that any such bank or branch will be available for acquisition on any reasonably acceptable basis at any time in the foreseeable future, but also that—

". . . On the contrary, the evidence advanced at the trial has affirmatively established, and the court finds as a fact that there is no bank or branch in the Spokane metropolitan area other than WTB which NBC could acquire at the present time, and there is no reasonable probability that any such bank or branch will be available for acquisition by NBC on any reasonably acceptable basis at any time in the reasonably foreseeable future." (Finding of Fact No. 19(a), Jur. St. p. 31)

In order to proceed on any legal premise based on the assumption that NBC is a potential entrant into Spokane, these Findings of Fact must first be found to be in error. This is the determination Appellant seeks from this Court —a *de novo* review of the Findings.

On what basis does Appellant seek to justify such action by this Court? We have, of course, Appellant's own flat statement:

"In the instant case, NBC had both the capability and the interest to make it a potential entrant." (Jur. St. p. 17)

However, specific reasons as to how the District Court has so misconstrued the evidence as to justify a *de novo* review and the overturning of its Findings are not apparent.

In a footnote (Jur. St. p. 16), Appellant suggests that there is a downtown bank in Spokane "which will be eligible for acquisition in 1975",[8] and that NBC has negotiated to buy a bank in the suburbs.[9] This is hardly a persuasive basis for considering the overturning of the Court's finding on the availability of an alternative acquisition.

As we have already mentioned (p. 12, *supra*), Appellant concedes that the legal bar to *de novo* branching by NBC into Spokane does, indeed, exist; and that the only legal means of branching under Washington law[10] is to "acquire" an "existing" bank.

Appellant asserts, however, that *de novo* entry into areas foreclosed to *de novo* branching may be achieved "by sponsoring the organization of an affiliate bank, and later acquiring the bank." (Jur. St. p. 8.) Such a bank would be "formed by [NBC's] officers, directors or their associates as an independent firm to be assisted by NBC until acquired and converted into a branch". (Id.)

In other words, according to Appellant, all that a bank has to do to establish a branch in a forbidden area is to go

8. i.e., due to a legal restriction imposed by Washington law on state banks (RCW 30.08.020(7)) that they cannot be acquired for a given period subsequent to organization. There is no evidence that this bank would, or even might, be for sale when this restriction expires.

9. The evidence showed that this bank is not now for sale, and probably never actualy was, since the asking price was almost twice the amount NBC felt to be an acceptable price. Also, the two banking offices of this bank are located in a suburb of the city, and would not provide entry to the downtown area, which is essential to viable competition in Spokane.

10. RCW 30.40.020, App. III, p. A-6, *infra*.

through the motions of sponsoring the charter of a new bank (the sole purpose of the charter being the first step in the process of establishing the branch), giving the new bank the appearance of an independent bank long enough to dissemble its real purpose and character, and then "acquiring" it.

Appellant makes this assertion to this Court in the face of—

1. The testimony of Appellant's own expert witness, a former Supervisor of Banking of the State of Washington, who testified that such a procedure would be in violation of the restrictions on *de novo* branching in the state law;[11]

2. The testimony of the Regional Administrator of National Banks for the 13th Region (in which Spokane is located) that, if it were disclosed in an application for the organization of a national bank that the purpose for organizing the bank was to establish a branch for an existing bank, his office would regard this as an improper purpose and also a violation of state law in Washington, and would not approve the charter;[12]

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11. (Tr. 561 *et seq*). This testimony of Mr. McMurray is set out in App. IV, p. A-8, *infra*.

12. The Regional Administrator testified as follows (Tr. 975):

"... we do not allow the organizers or the shareholders of a new charter bank to enter into any oral or written agreements providing for the sale or disposition of the new bank."

He was then asked, and answered, the following question (Tr. 975):

"Q. What would you do Mr. Selby, if a group of people came to you and asked for a charter for the sole purpose of branching into Spokane?

"A. Well, that would be in effect *de novo* entry into Spokane which is not permitted by state law and we wouldn't accept the application."

3. That under Washington law, it would be a criminal offense, and the basis for forfeiture of its charter, for Appellee Marine Bancorporation to own, hold *or control* more than 25% of the stock of another bank;[13]

4. The Findings of Facts of the District Court above outlined; and

5. The obvious character of the device as a transparent attempt to evade the branch banking laws of the State of Washington.

Appellant does not deny that branching by national banks is limited by the law of the state in which they are situated, or that national banks may establish branches only when, where and how state law would authorize a state bank to establish and operate such a branch (12 USC §36(c)); *First National Bank in Plant City, Florida v. Dickinson*, 396 U.S. 122, *First National Bank of Logan, Utah v. Walker Bank & Trust Co.*, 385 U.S. 252.

The only basis suggested by Appellant for asking this Court to disregard the above testimony and overturn the District Court's finding is that there have been certain instances during the past ten years in which banks in smaller communities which had been assisted in their organization in varying degrees by larger city banks, were, after a number of years, permitted to merge with the larger banks which had so assisted them. (Jur. St. footnote 5, p. 9, and

13. RCW 30.04.230 (App. V, p. A-11, *infra*). Appellant's proposal certainly contemplates control of the "sponsored" bank by NBC from the start. Marine Bancorporation owns all of the stock of NBC other than directors' qualifying shares. As a national bank, NBC cannot invest in stock of another bank, 12 USC § 24. While the language of RCW 30.04.230 is susceptible to a technical argument that could produce a "loop hole" by which its proscription might be avoided (in that Marine would never actually "acquire" any shares of the new bank), the penalty of forfeiture of its charter is not one which is to be prudently ventured on such a speculation.

footnote 7, p. 14)[14]

There is no showing, except in the instance of certain acquisitions by Washington Bancshares, Inc.,[15] that there was any connection between the assistance provided by the larger bank and the later acquisition, or that the purpose of organizing the local bank had been to establish a branch of the larger bank. Thus, Appellants' assertion that this "method" of establishing a branch in a forbidden area

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14. It is a common practice for larger banks in Washington to assist in the organization of new banks, both state and national, in smaller communities of both Washington and Oregon, and this is encouraged by the regulatory authorities. Substantial benefits are derived on both sides—the new bank has the benefit of the larger bank's expertise in the intricacies of organization and getting started in the banking business, and the larger bank obtains a correspondent in the community and can ordinarily expect to handle the new bank's overlines on a participation basis. With respect to state banks organized subsequent to 1959, Washington law (RCW 30.08.020(7), App. VI, p. A-12, *infra*) requires a provision in the charter that the bank may not be acquired by another bank within 10 years without the consent of the Supervisor of Banking. The obvious purpose of this statutory restriction is to prevent the very gambit that Appellant proposes NBC should follow. Appellant asserts that this restriction does not apply to national banks which are chartered under federal law (Jur. St. footnote 5). However, no authority is cited in support of this assertion, and Appellees know of none. On the contrary, the clear import of the rules laid down by this Court in *First National Bank of Logan, Utah v. Walker Bank & Trust Co.*, 385 U.S. 252, and *First National Bank in Plant City, Florida v. Dickinson*, 396 U.S. 122 would seem to indicate a contrary conclusion.

15. The Chairman of Washington Bancshares, Inc. (deceased at the time of the trial) testified in a deposition that Washington Bancshares, Inc. assisted in the organization of five banks in smaller communities in Eastern Washington for the purpose of establishing them as branches of Old National Bank of Spokane, and that they were later so acquired. He also testified, however, that this was not disclosed to the Comptroller of the currency in the applications for the charters for these banks. (Tr. 293-295) All that can fairly be derived from these instances is that Washington Bancshares, Inc. set out to evade the Washington branching law, and by concealing from the regulatory authority the real purpose for the organization of these banks, managed to get away with it—in violation of both state and federal law. Applications for the charter of national banks now specifically require disclosure of the purpose of the organization of the bank, and if, as the Regional Administrator testified (*supra*, p. 19), the purpose was stated to be to establish a branch for another bank in an area where it was prohibited from doing so directly, the Charter would be denied.

"is a legal and well-recognized practice" and is "recognized by federal banking authorities" (Jur. St. p. 8), is not only contradicted by the testimony of his own expert witness, a former Supervisor of Banking of the state, *and* by the very federal banking authority referred to, in the person of the Regional Administrator, but is not really supported by anything whatsoever in the record.

There is also an even more decisive refutation of the viability of Appellants' suggested means of entry by NBC into Spokane. As Appellant has itself characterized it, it is a "device" (Jur. St. footnote 5, p. 9). And it is a device with the express purpose of evading the statutory restriction on *de novo* branching. On its face, such a method cannot be a legal method. As stated by the Court of Appeals for the Sixth Circuit in a case involving a comparable scheme:

> ". . . it is not legally permissible for the defendants herein to amend the Michigan branch banking restrictions 'by clever devices of evasion'." (*Bank of Dearborn v. Manufacturers Nat. Bank of Detroit*, 377 F.2d 496 at p. 498)

To the same effect: *Whitney National Bank in Jefferson Parish v. Bank of New Orleans and Trust Company*, 323 F.2d 290 (C.A.D.C.) *rev'd on other grounds*, 379 U.S. 411.

Such is the only alternative means of entry into Spokane which even Appellant can suggest. Such is the basis of Appellant's assertion that NBC is a potential entrant into Spokane.

The Economic Barriers to Entry

Although the above legal barriers would effectively foreclose any basis for regarding NBC as a potential entrant

into the Spokane area, the District Court further found that any method of entry which would be limited to a foothold or the substantial equivalent of a *de novo* entry would, even if it could be legally accomplished, not be economically feasible for NBC. (Finding of Fact No. 19(b), Jur. St. p. 31)

The Court assigned a number of specific reasons in support of this finding:

> A. It would not be compatible with prudent business practice in commercial banking for a major full-service bank such as NBC to enter a metropolitan area such as Spokane on a limited-service basis comparable to that of a newy-organized independent unit bank. To do so would be more of a detriment than a benefit to NBC.
>
> B. Due to the extensive development of branch banking in Washington metropolitan areas such as Spokane, branch offices are essential to effective competition. As a Seattle bank, NBC could not establish additional branches in Spokane.
>
> C. Spokane's growth has been slow, and will continue to be slow to moderate. In Washington State, due to customer loyalty, new business is acquired by banks principally as a result of growth. Consequently, prospects of growth, or even survival, of a bank starting from scratch, or from a minimal foothold, are negative.
>
> D. A small banking office, such as would be compatible with the limited deposits which could be expected for the first five to ten years, could not house

or support the full services of a bank such as NBC. Experience of foothold entry of Pacific National Bank into Spokane, and foothold entry of Old National Bank into Seattle has been such as to discourage such projects, even if a small going bank were available.

E. Profitable correspondent relationships enjoyed by NBC in Spokane, especially with WTB, would be lost if NBC were to enter by other means.

F. Commitment of cash resources would be entirely out of line with earnings and benefits which could reasonably be expected.

(Finding of Fact No. 19(b), Jur. St. pp. 31-33.)

Appellant has not challenged these findings, except to complain that they are based on "subjective," rather than objective, evidence. In this connection, we submit that Appellant must have confused this case with one of its other cases in which the District Court has relied heavily upon the stated intentions of management. As appears from the Court's findings in this case as above outlined, the Court has determined that existing circumstances established by the evidence create economic barriers to entry which would be applicable, not just to NBC, but also to any other comparable bank similarly situated, and that in view of these barriers it would not be prudent from a business standpoint to enter Spokane at all, if the only means of entry were those said to be available by Appellant.

In any event, in view of the positive legal barriers to entry by NBC in this case, the economic barriers which are decisive in most cases[16] assume a secondary role here.

16. For example, *U.S. v. First National Bancorporation*, .. U.S. .., No. 71-703 (2/28/73).

Where the bank is barred by law from entry, speculation as to whether it would find it economically feasible to enter if it could becomes somewhat academic except as a counter to the asserted possibility that there is a way to "avoid" the restrictions imposed by Washington law on *de novo* branching.

Without a redetermination by this Court of the Findings of Fact that NBC is not a potential entrant into Spokane by any means other than the challenged merger, there is no basis for a contention that the merger may lessen competition by eliminating potential competition by NBC in Spokane. Consequently, the real question presented by the Jurisdictional Statement is whether this Court should review the case *de novo* on the record for the purpose of determining whether on the evidence produced this Court would arrive at the conclusions for which the Appellant is contending. This Court is precluded from so doing by Fed. R. of Civ. P. Rule 52(a), 28 USC which provides:

> "Findings of fact shall not be set aside unless clearly erroneous and due regard shall be given to the opinion of the trial court to judge credibility of witnesses."

As this Court said in *United States v. Yellow Cab Co.*, 338 U.S. 138, at page 342:

> "It ought to be unnecessary to say that Rule 52 applies to appeals by the Government as well as to those by other litigants. There is no exception which permits it, even in an antitrust case, to come to this Court for which virtually amounts to a trial de novo on the record of such findings as intent, motive and design.
>
> While, of course, it would be our duty to correct clear error, even in findings of fact, the Government has failed to establish any greater grievance here than it might have in any case where the evidence would support a conclusion either way but where the trial court

> has decided it to weigh more heavily for the defendants. Such a choice between two permissible views of the weight of evidence is not 'clearly erroneous.'"

And as Mr. Justice Douglas states in *United States v. National Association of Real Estate Boards*, 339 U.S. 485, another antitrust case, at page 495:

> "It is not enough that we might give the facts another construction, resolve the ambiguities differently, and find a more sinister cast to actions which the District Court apparently deemed innocent . . . [citations] . . . We are not given those choices, because our mandate is not to set aside findings of fact 'unless clearly erroneous.'"

Appellant makes no contention that the evidence is not sufficient to support the findings of the District Court, but merely asserts disagreement. In the absence of some contention on the part of Appellant that the findings are without evidentiary support, or that the evidence preponderates to the contrary, no need for plenary review is required for the disposition of the appeal.

Other Challenges by Appellant to Facts Found by the District Court

There are only two other issues to which Appellant takes exception in its Jurisdictional Statement. Both are purely questions of fact upon which the Court has made positive findings of fact directly contrary to Appellant's assertions.

NBC Not a Factor in the Spokane Market

In addition to its finding that in the event the merger is not consummated there is no reasonable probability that NBC will enter Spokane in the reasonably foreseeable future (*supra*), the Court also found that—

"... the threat of entry by NBC into the Spokane market by any means other than the consummation of the merger, to the extent any such threat exists, does not have any significant effect on the competitive practices of commercial banks in that market nor any significant effect on the level of competition therein." (Finding of Fact No. 21, Jur. St. p. 34)

Appellant disputes this Finding, saying that the Court ignored evidence to the contrary. Even this evidence to the contrary does not really exist, as an examination of the citations to the record[17] made by Appellant on page 19 of the Jurisdictional Statement will show.

It is true, as Appellant asserts, that NBC has been desirous of entering Spokane for many years, and that the Spokane banking community is fully aware of this. It is also true, however, that NBC has never been able to make an entry, and the Spokane banking community is also aware of that. There is little to fear from an outsider who has no means of entry.

The determination of this question of fact is the province of the District Court, *U.S. v. Falstaff Brewing Corp.*, ... U.S. ....., No. 71-873 (2/28/73), and the District Court in this case has made the determination.

WTB Not a Potential Competitor Outside the Spokane Metropolitan Area

Appellant makes a brief assertion that the merger may also be proscribed by Section 7 by reason of the elimination of Appellee WTB "as a potential competitor in those broader markets [Eastern Washington and the State as a whole] in relation to the leading statewide banks." (Jur. St. p. 22)

17. Including G F 21, 24 and 28 (and most of 29), which were never even admitted in evidence.

No basis for this assertion is given, and there is nothing of substance to support it in the record.

On the other hand, the District Court found that—

> "Plaintiff has failed to establish or produce any evidence whatsoever that there is any reasonable probability that WTB will expand into other banking markets in eastern Washington or that WTB has the incentive or capability to do so. Plaintiff has also failed to establish or produce any evidence whatsoever that there is any reasonable probability that WTB will combine with other middle-sized or smaller banks for any purpose. On the other hand, Defendants have presented clear and convincing evidence to the effect that WTB has neither the capability, resources or incentive to embark on any such schemes of expansion or consolidation, and the Court finds that there is no reasonable probability that WTB will take any such action in the reasonably foreseeable future." (Finding of Fact No. 23, Jur. St. p. 35)

This is an issue in which Appellant had the burden of proof. In the view of the District Court, Appellant not only failed to sustain it, but the contrary was affirmatively established by Appellant.

As with respect to the other questions raised by Appellant, this question is nothing but a challenge of the facts found by the District Court which would require a trial *de novo* in this Court to resolve.

CONCLUSION

The appeal should be dismissed for failure to comply with the Rules of this Court. In the alternative, the judgment of the District Court should be summarily affirmed for lack of a substantial question requiring plenary review by this Court.

MOTION TO ADVANCE THE CASE FOR EARLY ARGUMENT

The appellee banks also move herewith for the Court to advance the case for early argument. The Court need pass on this motion only if it decides not to dismiss the appeal or affirm the judgment of the District Court. Good cause exists to warrant this request.

The agreement to merge was entered into in February 1971. Application to approve the merger was made to the Comptroller on March 9, 1971. A public hearing was held on the application before the Regional Administrator of national banks in Portland, Oregon on July 27, 1971. The Comptroller of the Currency approved the merger September 24, 1971. The Justice Department filed its suit in the District Court October 22, 1971. An eight-day trial was held in Tacoma commencing January 9, 1972. The District Court judge entered judgment on January 31, 1972. Appellant filed a motion for further findings on February 9, 1972, which was argued and disposed of February 22, 1972. Notice of Appeal was filed on March 30, 1972 and the jurisdictional statement was filed June 30, 1972.

The foregoing will indicate the delays that have occurred while waiting the outcome of this case. The man hours in time of bank officers and personnel has been tremendous, the expenses involved substantial. The mere filing of the complaint without any factual showing of illegality has withheld completion of this merger now for more than two years—notwithstanding that both the Comptroller of the Currency and the District Court have found the proposed merger not only to be without violation of any statute but actually beneficial and in the public interest.

Both of the merging banks have been and continue to be seriously handicapped in their operations pending a final determination of the matter. Under the circumstances, simple fairness requires that the matter be adjudicated with finality as expeditiously as possible.

It is respectfully requested that if the appeal is not dismissed, or the judgment of the lower court not affirmed, this case be scheduled for early argument.

Respectfully submitted,

GRAHAM, MCCORD, DUNN, MOEN, JOHNSTON & ROSENQUIST

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APPENDIX I

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

UNITED STATES,
Appellant

v.

MARINE BANCORPORATION, *et al.*

APPLICATION FOR AN EXTENSION OF TIME FOR DOCKETING CASE ON APPEAL

Pursuant to Rule 13(d) of this Court's rules, the Solicitor General, on behalf of the United States, applies for an extension of time to docket the appeal herein from May 23, 1973 to June 30, 1973.

This is a civil antitrust suit by the United States under Section 7 of the Clayton Act. The complaint challenged the proposed merger of Washington Trust Bank, Spokane, Washington, into the National Bank of Commerce of Seattle ("NBC"). NBC is wholly owned by Marine Bancorporation, Inc., a holding company chartered in Washington. The government contended that the acquisition would eliminate NBC as a significant potential competitor in commercial banking in the Spokane metropolitan area, would contribute to domination of commercial banking in Washington by a few large banking organizations, and would have other anticompetitive effects. After a trial on the merits, the district court ruled from the bench that the proposed merger does not violate Section 7, and it subsequently adopted formal findings of fact and conclusions of law.

A previous application for an extension of time to docket the appeal from May 1, 1973 until May 23, 1973 was granted by Mr. Justice Douglas. The previous extension was sought to eliminate uncertainty as to the date on which the appeal should be docketed. The findings and conclu-

sions, and the judgment of the district court were initially entered on January 31, 1973. Thereafter the government filed a timely motion to amend the findings and conclusions pursuant to F.R.Civ.P. 52(b). This motion was denied on February 22, 1973.

We believe that the motion under Rule 52(b) tolled the time for filing a notice of appeal, and also tolled the time for docketing the appeal from May 1, 1973, the ninetieth day after the initial entry of judgment, to May 23, 1973. To avoid any jurisdictional question over the tolling of the time for appeal, however, we filed a notice of appeal on March 30, 1973. The initial extension of time was requested to eliminate any question whether the docketing date for the government' appeal was May 23, 1973, the ninetieth day after the denial of the government's Rule 52(b) motion.

The Solicitor General has now authorized a direct appeal. The additional thirty-eight day extension requested here is necessary to complete the jurisdictional statement and print it.

Respectfully submitted,

ERWIN N. GRISWOLD
Solicitor General.

May 1973.

APPENDIX II

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

UNITED STATES,
Appellant,

v.

MARINE BANCORPORATION, *et al.*

DEFENDANT'S OBJECTIONS TO FURTHER EXTENDING TIME FOR DOCKETING CASE ON APPEAL

On May 3, 1973, Mr. Justice Douglas signed an Order extending until May 23, 1973 the time for docketing this case on appeal. The Defendants did not resist the application for that Order.

On Tuesday, May 17, 1973, Defendants received in the mail a copy of another application by Plaintiff seeking a further extension of time until June 30, 1973 in which to docket the case on appeal. No reason is assigned for the second request other than that the additional 38 days extension is necessary to complete the jurisdictional statement and print it.

The Defendants object to a further extension for the reason that Plaintiff has not shown "good cause" for a further extension as required by Rule 13 of this Court, nor has Plaintiff submitted its application for the further extension within 10 days before expiration of the period sought to be extended as required by Paragraph 2 of this Court's Rule 34.

Applications for extensions of time are governed by Supreme Court Rule 13, which reads, in part, as follows:

> Rule 13. - 1. "Not more than ninety days after the entry of the judgment appealed from it shall be the duty of the appellant to docket the case in the manner set forth in paragraph 2 of this rule . . . For good cause shown, a justice of this court may extend the

> time for docketing a case for a period not exceeding sixty days . . . Such applications are not favored."

We submit the application submitted completely fails to show cause sufficient to authorize an extension of additional time under the rule.

Consummation of the merger sought to be enjoined in this litigation has now been delayed since October 22, 1971. Expense of the delay to the Defendant banks is substantial and the damage is irreparable. Each additional day's delay adds to that damage.

On January 17, 1973, after a trial on the merits, the District Court announced its decision that the proposed merger did not violate Section 7 of the Clayton Act, as contended by Plaintiff. Final Judgment in accordance with the Court's decision was entered on January 31, 1973. An Order denying Plaintiff's motion to amend Findings of Fact was entered February 22, 1973 and Notice of Appeal was filed by Plaintiff March 30, 1973. The Order already entered herein extending until May 23, 1973 the time for docketing the Appeal gives Plaintiff 125 days since the District Court made known its decision in which to perfect its appeal. Plaintiff has had all this time to prepare its jurisdictional statement and docket the appeal in this Court but offers no reason or explanation with respect to what, if anything, it has been doing during the 4-month period to advance the appeal. Preparation of the jurisdictional statement should not be difficult. The issues involved in this appeal are in principle the same as those already presented to this Court in the Greely case (U.S.A. vs. First National Bancorporation, Inc., Supreme Court Cause No. 71-703). The jurisdictional statement in this case will in all likelihood be so similar to the jurisdictional statement in the Greely case that its preparation for this case should not be any time consuming chore or necessitate any extended period of time for its completion. If further time is now necessary for Plaintiff to docket the appeal, certainly Defendants are entitled to some showing other than the bald assertion that another 38 days is now necessary to complete and print the jurisdictional statement.

The time limitation for applications of this kind is governed by Paragraph 2 of Supreme Court Rule 34. This rule

requires applications for extension of time to docket appeals to be submitted at least 10 days before expiration of the period sought to be extended. The period here sought to be extended now expires May 23, 1973. The copy of the application mailed to Defendants is not dated, so it is impossible for Defendants to determine whether Plaintiff complied with this rule which reads:

> "Applications for extensions of time to docket appeals shall be submitted at least ten days before the expiration of the period sought to be extended and will not be granted except in the most extraordinary circumstances if filed during the last ten days of such period."

We assume that had this application been timely made, the Defendants would have had notice thereof prior to May 17, 1973. Ordinarily mail from Washington is received in Seattle in one day, and seldom in more than two. Plaintiff's application for the extension contains nothing to show "most extraordinary circumstances" to warrant waiver of the 10-day requirement.

There isn't any reason why the Department of Justice shouldn't be held to the same standards of diligence, punctuality and compliance with the Court's rules as any other litigant, and in view of the extension of time that Plaintiff has already had, its failure to give any reasonable explanation as to why a further extension is necessary, the continuing injury to the Defendant banks resulting from delay, and the failure of the Plaintiff to abide by the rules of this Court, it is respectfully submitted that the application for a further extension of time to docket the appeal should be denied.

Respectfully submitted.

/s/ R. A. MOEN

one of the attorneys for the Defendants

May 17, 1973

APPENDIX III

Statutory limitation on branch banking in Washington. Note particularly the last paragraph.*

Section 30.40.020, chapter 33, Laws of 1955 as amended by section 6, chapter 136, Laws of 1969 and RCW 30.40.-020 are each amended to read as follows:

A bank or trust company having a paid-in capital of not less than five hundred thousand dollars may, with the approval of the supervisor, establish and operate branches in any city or town within the state. A bank or trust company having a paid-in capital of not less than two hundred thousand dollars may, with the approval of the supervisor, establish and operate branches within the limits of the county in which its principal place of business is located. A bank having a paid-in capital of not less than one million dollars may, with the approval of the supervisor, establish and operate branches in any foreign country. The supervisor's approval of a branch within this state shall be conditioned on a finding that the resources in the neighborhood of the proposed location and in the surrounding country offer a reasonable promise of adequate support for the proposed branch and that the proposed branch is not being formed for other than the legitimate objects covered by this title. The supervisor's approval of a branch in a foreign country shall be conditioned on a finding that the proposed location offers a reasonable promise of adequate support for the proposed branch, that the proposed branch is not being formed for other than the legitimate objects covered by this title, and that the principal purpose for establihsing such branch is to aid in financing or facilitating exports and/or imports and the exchange of commodities with any foreign country or the agencies or nationals thereof.

The aggregate paid-in capital stock of every bank or trust company operating branches shall at no time be less than the aggregate of the minimum capital required by law for the establishment of an equal number of banks or

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*NOTE: The above statute is quoted as amended by the 1973 legislature. The amendments are in no way pertinent to any issue in this case.

trust companies in the cities or towns wherein the principal office or place of business of such bank or trust company and its branches are located.

No bank or trust company shall establish or operate any branch, except a branch in a foreign country, in any city or town outside the city or town in which its principal place of business is located in which any bank, trust company or national banking association regularly transacts a banking or trust business, except by taking over or acquiring an existing bank, trust company or national banking association or the branch of any bank, trust company or national banking association operating in such city or town.

APPENDIX IV

Testimony on cross-examination of Joseph E. McMurray, former Supervisor of Banking for Washington, called as witness for Appellant, pertaining to "sponsoring" a new bank for the purpose of its subsequent acquisition as a branch. (Tr. 561 *et seq.*)

Q If the purpose of the application was for sale at a later date, wouldn't the Regulator want to know about it?

A Yes.

Q And if that were the reason for forming the bank, would you grant the charter?

A I would not have considered that as a proper object, for the formation of a bank, to establish a branch; if that were the object, to establish a branch.

Q If it were the object, would you agree with the last sentence of that second indented paragraph that says that the bank is not being formed for legitimate purposes?

A If that were the object, yes. It was never demonstrated to me; apparently it has not been demonstrated, in fact, since the bank still exists.

Q You are aware, are you not, of Revised Code of Washington 30.08.030, which provides among other things that banks in Washington may be organized only for legitimate objects specified by state banking laws, is that correct?

A I believe that is the proper wording; if you are reading it, I accept it.

Q And organization for purpose of sale would not be a legitimate object?

A I don't believe it would. I would like to qualify my answer in terms of reality. The organizers of banks must, if they are properly advised by counsel, be aware of the fact that their stock is alienable. There is a ten year clause in state law that puts a limit, or rather conditions that alienability, but eventually it

is alienable, unlike, for example, a contribution to a fund to start a mutual savings bank, or a mutual savings and loan association, which in effect would be lost forever.

Q I think you are referring to RCW 30.08.020, which requires banks to provide in their articles of incorporation a prohibition against sale or merger for a period of not less than ten nor not more than twenty years?

A Yes.

Q That statute was passed during your term as Supervisor, was it not?

A Yes, it was.

Q What was the purpose of that statute?

MR. TORRE: Objection, your Honor, such evidence is inadmissible under the decisions of the Supreme Court of the State of Washington. The statute speaks for itself.

THE COURT: Well, he doesn't have to answer it, I think I understand.

Q (By Mr. Moen) Well, let me ask it this way: In your capacity as Supervisor did you make a recommendation to the legislature as to whether that Act should be passed?

A I don't know that they asked me specifically for a recommendation. It might have come up in a committee hearing. I did not make any recommendation against it. I assisted in the drafting of the legislation.

Q Did you feel that it was favorable legislation?

A In the public interest, yes.

Q In what respect?

A I feel, I feel now and I felt then, that the public interest would not be served by the instability that would result from bank formations solely for the purpose of a business transaction, rather than for the purpose of providing banking services to a community.

Q Do you recall in that statute that there is a provision which enables the supervisor to waive the waiting period?

A Yes. I don't recall the precise language.

Q But you are familiar with the substance of it?

A Yes.

Q And what was the purpose of that waiver?

MR. TORRE: Again, your Honor, the same objection.

THE COURT: No, overruled. I will let him answer as to what the purpose of the waiver was.

A Well, the legislature in its wisdom decided that there should not be such inflexibility that a bank, once established, must continue to operate regardless of the circumstances for a period of ten years, since circumstances unforeseeable could be so compelling with respect to permitting the bank to be rescued, or acquired, or sold out, in order to maintain banking facilities, and in order to maintain solvency. We had a case during the time I was a supervisor in which a very capable bank president was killed by a train. Conceivably the entire management of a bank could be wiped out in some tragedy, and there would be a problem.

Q And the bank might be in financial difficulties?

A Or there could be financial difficulty.

Q Do you think it would be proper for the waiting period to be waived without some cause or reason therefor?

A No, I don't think that the Supervisor of Banking should have the power to be frivolous in that kind of decision.

Q And you would not so construe that statute if you were Supervisor?

A As Supervisor I would have looked with careful scrutiny at any request for a waiver."

APPENDIX V

*25% Restriction on Holding Company ownership or control of Bank stock.**

Section 30.04.230, chapter 33, Laws of 1955 as amended by section 1, chapter 69, Laws of 1961 and RCW 30.04.230 are each amended to read as follows:

A corporation or association organized under the laws of this state, or licensed to transact business in the state, shall not hereafter acquire any shares of stock of any bank, trust company, or national banking association which, in the aggregate, enable it to own, hold, or control more than twenty-five percent of the capital stock of more than one such bank, trust company, or national banking association: *Provided, however,* That the foregoing restriction shall not apply as to any legal commitments existing on February 27, 1933: *And provided, further,* That the foregoing restriction shall not apply to prevent any such corporation or association which has its principal place of business in this state from acquiring additional shares of stock in a bank, trust company, or national banking association in which such corporation or association owned twenty-five percent or more of the capital stock on January 1, 1961.

A person who does, or conspires with another or others in doing, an act in violation of this section shall be guilty of a gross misdemeanor. A corporation that violates this section, or a corporation whose stock is acquired in violation hereof, shall forfeit its charter if it be a domestic corporation, or its license to transact business if it be a foreign corporation; and the forfeiture shall be enforced in an action by the state brought by the attorney general.

Approved April 20, 1973.

*NOTE: The above statute is quoted as amended by the 1973 legislature. The amendments are in no way pertinent to any issue in this case.

APPENDIX VI

Washington statute prohibiting acquisition of State bank during the first ten years of its existence.

30.08.020 Articles of incorporation—Execution—Contents.

Persons desiring to incorporate a bank or trust company shall execute articles of incorporation in quadruplicate, which shall be submitted for examination to the supervisor at his office in Olympia.

Articles of incorporation shall state:

(1) The name of such bank or trust company.

(2) The city, village or locality and county where such corporation is to be located.

(3) The nature of its business, whether that of a commercial bank, a savings bank or both or a trust company.

(4) The amount of its capital stock, which shall be divided into shares of not less than ten dollars each, nor more than one hundred dollars each, as may be provided in the articles of incorporation.

(5) The period for which such corporation is organized, which may be for a stated number of years or perpetual.

(6) The names and places of residence of the persons who as directors are to manage the corporation until the first annual meeting of its stockholders.

(7) That for a stated number of years, which shall be not less than ten nor more than twenty years from the date of approval of the articles (a) no voting share of the corporation shall, without the prior written approval of the supervisor, be affirmatively voted for any proposal which would have the effect of sale, conversion, merger, or consolidation to or with, any other banking entity or affiliated financial interest, whether through transfer of stock ownership, sale of assets, or otherwise, (b) the corporation shall take no action to consummate any sale, conversion, merger, or consolidation in violation of this subdivision,

(c) this provision of the articles shall not be revoked, altered, or amended by the shareholders without the prior written approval of the supervisor, and (d) all stock issued by the corporation shall be subject to this subdivision and a copy hereof shall be placed upon all certificates of stock issued by the corporation.

Such articles shall be acknowledged before an officer authorized to take acknowledgments.